TAN SIN CHONG v. HONG SAN KWONG ONN CHUAN FOUNDRY

[O.C.J. (Ismail Khan J.) September 20, 1967]

[Malacca — Civil Suit No. 131 of 1964]

Damages — Personal injuries — Right hand — Index and middle fingers — Amputation of.

Machinery (Driven Machinery) Regulations, 1959, regs. 31(i) & (ii) and 41 — Statutory liability of employers — Contributory negligence of workmen.

The plaintiff operating a power press machine at a foundry met with an accident whereby the injuries sustained necessitated amputation of the index and middle fingers of his right hand. He claimed damages against his employers the owners of the foundry for the injuries he alleged arose from failure to provide a hand guard on their machine contrary to regulations 31(i) and (iii) of the Machinery (Driven Machinery) Regulations, 1959, and regulation 41 which lay down statutory safeguards for workers operating such machines. The defendant denied any breach of statutory duty on their part and alleged the plaintiff's own fault and breach of duty in not complying with regulation 41 which requires the plaintiff as operator to make use of the safeguards as required by the regulations. The pleadings raised three issues for decision (a) was a hand guard provided on the machine (b) if so did the plaintiff remove it (c) even if the employers were in breach in not providing the safeguards did the evidence show that the plaintiff would nevertheless have not used the safeguards and operated without their protection so that their breach of duty was not the cause of the injuries. The answer to this would largely depend on the evidence. The evidence in the case between the plaintiff and the defendant was greatly in conflict and the judge examining the surrounding circumstances in the light of the probabilities of the case:—

Held: (1) the defendants were liable as no safeguard was provided;

(2) the plaintiff did not remove the hand guard, therefore, no contributory negligence was attributable to him;

(3) the plaintiff was only an apprentice and there was no evidence to warrant the inference that he would not have used the hand guard if one was provided;

(4) the defendants were solely liable. Plaintiff was allowed the agreed sum of $318 as special damages and general damages assessed at $3,000.

Cases referred to:—

(1) *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.* [1962] M.L.J. 15.

(2) *Lew Fa* v. *Seng Chong Metal Works Ltd.* [1966] 1 M.L.J. 231.

(3) *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152.

(4) *Cummings (or McWilliams)* v. *Sir William Arrol & Co. Ltd. & Anor.* [1962] 1 All E.R. 623.

CIVIL SUIT.

H. E. Cashin for the plaintiff.

Edgar Joseph Jr. for the defendants.

Cur. Adv. Vult.

Ismail Khan J.: On 26th March, 1964, an accident occurred at a foundry when the plaintiff was operating a power press machine. As a result of such accident he sustained injuries which necessitated the amputation of his right index finger at the junction of the middle and proximal one-third of the distal phalanx, amputation of the right middle finger across the middle portion of the middle phalanx.

In this action the plaintiff claims damages for these injuries in the accident, which he alleges in his amended statement of claim arose from the failure on the part of the defendants, the owners of the foundry, to provide a hand guard on their machine, and to comply with regulation 31(i) and (iii) and regulation 41 of the Machinery (Driven Machinery) Regulations, 1959.

Regulation 31(i) reads:—

'Every hand fed power press shall be provided with one of the following means of protection:

(a) A static fixed guard so arranged to guard the front and both sides of the ram as to prevent the operator's fingers from reaching the danger zone. The distance of the front (or feeding side) of the fixed guard from the ram and length and depth of feed opening shall comply, wherever practicable, with the Third Schedule.

(b) An interlocked guard so arranged that the ram cannot make a pressing stroke unless the guard is in its protective position and so guards the front and both sides of the ram that the operator's fingers cannot reach the danger zone when the guard is in its protective position.

(c) A two hand operating device so arranged as to prevent the placing of hands in the danger zone before completion of the operating stroke of the ram. Such operating device shall be designed to require the simultaneous action of both hands of the operator to operate the press and shall be so arranged and installed that it cannot be operated by one hand. On pedal operated presses a device may be provided which requires both hands of the operator to release it before the foot pedal can be moved.

(d) An automatic sweep guard so arranged to sweep the operator's hand out of the danger zone as the ram descends, and fixed guards at the sides of the press, so arranged that no 'nipping' hazard can exist between the sweep guard and any fixed structure: Provided that no protective device need be fitted to any hand fed power press where the stroke of the ram is such that the maximum possible clearance between the ram and the die or stripper is three-eights of an inch or less."

Regulation 31(iii) reads:—

"Every foot pedal on every hand fed press shall be shielded that it cannot be accidentally struck."

Regulation 41 reads:—

"It shall be the duty of the owner to provide and maintain the fencing, and to ensure that these regulations are observed. It shall be the duty of the operator to make use of the fencing."

The amended defence denies any breach of statutory duty. It alleges that the accident was caused solely, or contributed to, by the plaintiff's breach of regulation 41.

In two local cases, viz. *Lim Thong Eng* v. *Sungei Choh Rubber Co. Ltd.*,(1) and *Lew Fa* v. *Seng Chong Metal Works Ltd.*,(2) where most of the relevant authorities were reviewed, it was

held that the above rules impose an absolute liability on the owner of the machine. But as Lord Atkin observed in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[3] :—

"The statute does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises; as, for instance, if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendant's omission but by the plaintiff's own act. But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand if the plaintiff were negligent but his negligence was not a cause operating to produce the damage there would be no defence."

It is not disputed that the machine is a power press machine within the meaning of the Ordinance. It is fitted with a hand guard with a metal flap covering the front section of the ram. The other three sides are covered by a fenced metal guard. If the front flap is open, there is no danger of the ram coming down in case of any pressure to the foot pedal. The front flap and the foot pedal are interlocked. In the absence of any hand guard there is a danger of the operator's hand reaching the danger zone. Failure to instal such a guard would therefore be a breach of statutory duty on the part of the defendants.

The questions that fall to be decided are:—

(1) Was there a hand guard on the machine at the material time?

(2) If there was such a guard, did the plaintiff remove it?

(3) If there was no guard, could the plaintiff on the evidence still have not used it even if it was provided?

Briefly, the plaintiff's evidence is as follows: He was engaged at the foundry as an apprentice for about one year. He had started to operate the machine only a month before the accident. There was no hand guard on the machine on the day in question nor was it anywhere in the foundry. A new mould was fitted to the ram. He was about to remove the pressed piece from the machine when the ram dropped and injured his hand. He admitted this account differed from the one he gave to one Ng Kim Chew (P.W.1) of the Machinery Department when the latter came to inspect the machine on 20th May, 1964. From his evidence, *inter alia*, this is what he told P.W.1: ". . . . At the time of the accident the shield (hand guard) was in the position as shown in P3A. When I lifted the shield and pressed the foot pedal the ram did not come down and a bolt came off the machine. Also that when I put in my hand to remove the impressed plate I pressed the foot pedal and the ram came down. The ram came down as the bolt had come out." He knew that this account was false and untrue. He explained, however, that he had been coached to give it by one Ah Seng (P.W.2) the brother of the manager Wong Heng Hong (D.W.1).

D.W.1 and D.W.2 said that the guard was on the machine at all times. On the morning of 26th March, 1964, it was there. This was confirmed by two witnesses, an employee of the foundry (D.W.3), and the foreman (D.W.4). The foreman said it was still on the machine at 1.15 p.m. The first intimation the two brothers had of the accident was by telephone from the foreman who said the accident happened because the plaintiff had removed the hand guard. They immediately left for the foundry but by then the plaintiff had been removed to hospital. At the hospital they learned from the plaintiff his version of the accident which was that a screw and spring came off the machine. They knew this was untrue. They denied having coached the plaintiff to say so to P.W.1.

There is a conflict between the evidence of the plaintiff and that of D.W.1 and D.W.2 and their witnesses. It is therefore necessary to test the evidence against the surrounding circumstances and in the light of the probabilities of the case. It seems to me strange that knowing the explanation given by the plaintiff at the hospital to be false, the two brothers D.W.1 and D.W.2 should yet adopt it in their reply to the questionnaire from the Labour Department (P5). They said they did this to help the plaintiff to get damages due to him. The plaintiff was then only a boy of seventeen, an apprentice, and would be unversed in such matters as claims for compensation for his injuries. He could have discussed the matter with his employers, and it is highly probable that they would have coached him to give the explanation to P.W.1 and set out in P5. This was not done from any altruistic motives. D7 shows that the plaintiff had taken out a policy in respect of the workmen at the foundry. The insurance company appeared to have found the defendants unco-operative in the matter of the investigation into the claim relating to the plaintiff. Any suggestion that the guard was not on the machine would prejudice the defendants' claim with the insurance company. A story favourable to the defendants such as that purported to have been given by the plaintiff to the defendants at the hospital would eminently suit the defendants. It is here that the evidence of the coaching by the defendants will be seen to fall into its proper place. I find as a fact that the plaintiff was taught to give the story to P.W.1.

It was pointed out that there was some discrepancy between the plaintiff's evidence of what he told P.W.1 and D6. D6 makes no mention of a bolt or screw having come off. But P.W.1 in evidence said that in his interview with him the plaintiff did mention about the bolt. It is possible that lapse of time (the interview was in 1964) may account for the apparent discrepancy, particularly when he had been tutored to give his story. The plaintiff certainly said he was coached by D.W.1 only on the day of the interview with P.W.1. It seems to me more probable that he was first told what to say earlier probably at the hospital and was again reminded of it on 20th May, 1964.

Having found as a fact that the defendants did coach the plaintiff, I also find as a fact that the hand guard was not on the machine at the time of the accident, and I further find as a fact that the plaintiff never removed it. I cannot accept the defence version. Apart from the obvious bias in the evidence of the witnesses, there are the improbabilities and discrepancies. To start with, there is D.W.1's evidence. He admitted after some hesitation that he heard the foreman telling D.W.2 that the plaintiff had removed the hand guard and had injured his hand. He then contradicted himself by saying that at the time he talked to the plaintiff, he was not aware of the foreman's account of the accident. Then again, having heard the plaintiff's story, he failed to question the foreman about it. D.W.2 clearly contradicted D.W.1, when he said he did not know that the plaintiff had removed the hand guard. His story that he failed to inform D.W.1 on the way to the foundry and at the hospital that the plaintiff had removed the guard is not only improbable but impossible to believe. Both admitted that the account of the accident in P5 was a lie. D.W.3, an employee at the foundry, and the foreman D.W.4, said that the removal of the hand guard would take some time and would require the use of a spanner to unscrew some bolts. Although they were working close to him, there is no evidence that they saw the plaintiff removing the guard. They saw it on the ground but there were no bolts or screws around. There was no spanner. Neither seemed to have asked the plaintiff how the accident happened. The foreman whose duty it was to supervise the plaintiff's work admitted that the guard would have to be removed on each change of mould, but removing the guard was not the work of an apprentice. The plaintiff was never taught how to remove it. The certificate of fitness in respect of the machine (D2) no doubt says that it was inspected and had complied with the regulations. But that was on 27th September, 1963. The guard could have been removed after that date. The foreman's evidence gives a clue as to why it could have been done. Each change of mould would necessitate the removal of the guard. This at any time would be a tiresome process. It is not improbable with the number of new moulds coming in, the guard had been taken off altogether to obviate the necessity of its removal each time a new mould had to be inserted in the machine.

I find that the guard would have prevented the plaintiff's fingers from reaching the danger zone. The defendants were in breach of their statutory duty in failing to provide the guard and this failure was the effective cause of the plaintiff's injury. I also find on the facts no evidence of any contributory negligence on the part of the plaintiff.

The last question to be decided is whether the plaintiff would have used the guard notwithstanding the failure of the defendants to provide one, assuming there was such a guard on the machine.

In the case of *Cummings (or McWilliams)* v. *Sir William Arrol & Co. Ltd. & Anor.*,[4] a steel erector fell seventy feet from a steel tower in the building of which he was assisting and was killed. His administrator claimed damages from his employers for negligence and from the occupiers of the shipyard where the tower was being built for breach of statutory duty under the Factories Act, 1937, section 26(2) in failing to provide a safety belt for use by the deceased. It was held assuming that the employers and the occupiers of the site were in breach of their respective duties in failing to provide the safety belt, nevertheless they were not liable in damages because their breach of duty was not the cause of the damage since:—

(a) on the evidence the deceased would not have worn a safety belt if it had been provided; and

(b) there was no duty on the part of the employers to instruct or exhort the deceased to wear a safety belt.

The answer to the question posed above would depend largely on the evidence in this case.

In the case cited there was evidence that:—

(a) steel erectors never wear safety belts except in certain very special circumstances which did not exist there;

(b) there was ample evidence from the respondent's employers and from others that safety belts were not worn when such work was being carried out;

(c) the deceased did not normally wear a safety belt and in particular it was proved he had been engaged in erecting riveters' scaffold on the crane when he fell off at heights greater than that from which he fell and at times when safety belts were available and that

he had not on such occasions worn or asked for a safety belt.

In the circumstances, as Viscount Kilmuir L.C. said: "It was clearly open to a court to infer that the deceased would not have worn a safety belt even if it was available."

In the instant case, there is not a scrap of evidence to suggest that the operators of the machine would dispense with the use of the guard while operating it, nor any evidence that the plaintiff had discarded it while engaged in such operation. He was only an apprentice, not an experienced worker, and had been at this type of work for only one month. There is nothing in the evidence in the present case to warrant the inference that the plaintiff would not have used the guard if one was provided. The defendants are solely liable.

On the question of damages, I allow the plaintiff his agreed special damages under the heading "Particulars of special damages" amounting to a sum of $318.

As regards general damages, Mr. Cashin makes no claim for loss of future earnings, and so taking into consideration all other relevant factors I would assess the general damages at $3,000.

There will be judgment for the plaintiff in the sum of $3,318.

The plaintiff will have the costs of the action.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Joseph & Son.*

CHONG THAIN VUN v. WATSON & ANOR.; HAMID DATUN v. MAJANGGIL & ANOR.; RICHARD E. YAP v. TUN DATU MUSTAPHA BIN DATU HARUN

[O.C.J. (Lee Hun Hoe J.) September 26, 1967]

[Jesselton — Election Petitions Nos. 1, 2 and 4 of 1967]

Election Petition — Personal service — Failure to serve notice of presentation of petition within 10 days — Publication in Gazette mandatory — Publication in Gazette outside period — Service condition precedent to jurisdiction — Extension of time — No power to extend — Election Offences Ordinance, 1954, s. 38 — Election Petition Rules, 1954, rr. 12(2)(3) and 15 — Failure to deposit sufficient sum by way of security — Courts of Judicature Act, 1964, s. 7(2).

Statute — Construction of — Interpretation of words used — No power in court to fill in gaps.

Motions were taken out by the respondents (1st respondent in petitions Nos. 1 and 2) to set aside three election petitions and one common ground in all three petitions was that the notice of the petition was not served on the respondent within 10 days of the presentation of the petition in accordance with rule 15 of the Election Petition Rules, 1954. In petitions Nos. 1 and 4 another common ground was that the petitioner in each case had failed to deposit by payment to the proper officer a sufficient sum by way of security for costs as is required under rule 12(2) of the Election Petition Rules, 1954. Petition No. 4 had one additional ground, i.e. that the petition was not presented within 21 days of the publication of the result of the election in the *Gazette* in accordance with section 38 of the Election Offences Ordinance, 1954. The result of the election in petition No. 4 was published in the *Gazette* on May 10, 1967 and the petition was lodged with the registrar on May 31, 1967.

Held: (1) the Election Petition Rules are mandatory and require strict compliance therewith. Non-compliance with the provisions of the Rules or the Ordinance must necessarily result in a jurisdictional defect and the court has no power to entertain the petitions;

(2) Election Petition No. 4 was presented within time under section 38 of the Election Offences Ordinance, 1954;

(3) all three petitions must be set aside on the ground that the service of the notice of the petition was not effected in accordance with the provisions of rule 15 of the Election Petition Rules;

(4) in petitions Nos. 1 and 4 the petitions must also be set aside on the grounds of insufficiency of security required under the provisions of rule 12(2) of the Rules.

Per Curiam: (1) the court has no power to extend time unless there is express provision in the particular written law to that effect; (2) the court will not give effect to the authority of a statute by enforcing it indirectly in cases where it cannot be enforced directly.

Cases referred to:—

(1) *Ex parte Fallon & White* 101 E.R. 159, 161; 5 T.R. 283.

(2) *Williams* v. *Burgess & Anor.* (1849), 10 L.J. Q.B. 10; 12 Ad. & El. 635.

(3) *Re North, Ex parte Hasluck* [1895] 2 Q.B. 264 & 269.

(4) *Lester* v. *Garland* 15 Ves. Jr. 248.

(5) *Trow* v. *Ind Coope (West Midlands) Ltd. & Anor.* [1967] 3 W.L.R. 633 & 639.

(6) *Goldsmith's Co.* v. *West Metropolitan Railway Co.* [1904] 1 K.B. 145.

(7) *Steward* v. *Chapman* [1951] 2 K.B. 792, 793.

(8) *Isaacs* v. *Royal Insurance Co.* L.R. 5 Ex. 296.

(9) *In re Railway Sleepers Supply Co.* 29 Ch. D. 204.

(10) *Yong Kuan Teik* v. *Devan Nair* [1964] M.L.J. M.L.J. 456.

(11) *Williams* v. *Mayor of Denby & Ors.* (1879), L.R. 5 C.P.D. 135.

(12) *Yong Kuan Teik* v. *Devan Nair* [1965] 2 M.L.J. 162.

(13) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261; [1967] 2 W.L.R. 846; [1967] 2 All E.R. 34, P.C.

(14) *Queen* v. *Justices of London & Anor.* [1893] 2 Q.B. 476.

(15) *Mayer* v. *Harding* (1867), L.R. 2 Q.B. 410 & 411.

(16) *Morgan* v. *Edwards* (1860), 29 L.J.M.C. 108.

(17) *Magor & St. Mellons Rural District Council* v. *Newport Corporation* [1952] A.C. 189 & 190.